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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(b) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS.

DOCKET NO. T-01051B-07-0693

DOCKET NO. T-03608A-07-0693

PROCEDURAL ORDER

BY THE COMMISSION:

On December 17, 2007, Qwest Corporation ("Qwest") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration under 47 U.S.C. § 252(b) and Arizona Administrative Code ("A.A.C.") R14-2-1505 ("Petition"). In its Petition, Qwest requested that the Commission resolve issues related to the Interconnection Agreement ("ICA") between Qwest and Arizona Dialtone, Inc. ("Arizona Dialtone"). According to Qwest, the issues derive from Arizona Dialtone's refusal to enter into an amendment to the current ICA ("ICA Amendment") that would implement changes related to unbundled access to mass market local circuit switching, changes that Qwest asserts are mandated by federal law, specifically the Federal Communications Commission's ("FCC's") Triennial Review Remand Order[1] ("TRRO") and 47 C.F.R. § 51.319(d). Qwest asserts that Arizona Dialtone has refused to transition its UNE-P services as required by the TRRO and federal regulations and has refused to enter into the ICA Amendment to implement TRRO-mandated changes. Qwest asks that the Commission arbitrate each disputed issue included in its Petition, resolve each issue in Qwest's favor, find that its proposed ICA Amendment is consistent with the applicable law, issue an order adopting its ICA Amendment, and grant such other relief as is fair and justified.

[1] *In re* Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 F.C.C.R. 2533 (2005)(Order on Remand).

Also on December 17, 2007, Qwest filed a Complaint against Arizona Dialtone, requesting that the Commission (1) declare that the ICA requires Arizona Dialtone to compensate Qwest at the transitional rate for UNE-P PAL and POTS for embedded services for a one-year transition period that began March 11, 2005, and at the rate for alternative services for new orders thereafter; (2) compel Arizona Dialtone to pay such charges to Qwest; (3) compel Arizona Dialtone to pay late payment charges on the amounts ordered to be paid; (4) compel Arizona Dialtone to execute the ICA Amendment and to comply with its obligations thereunder; and (5) award such other relief, including but not limited to appropriate fines or penalties, as the Commission deems just and reasonable.[2]

A joint procedural conference for the Arbitration matter and the Complaint matter was held on January 14, 2008, at the Commission's offices in Phoenix, Arizona. Qwest and Arizona Dialtone each appeared through counsel. Staff did not appear. Because it was Qwest, an incumbent local exchange carrier ("ILEC"), rather than Arizona Dialtone, a competitive local exchange carrier ("CLEC") that requested negotiation in the Arbitration matter, and 47 U.S.C. § 252(b)(1) allows a party to a negotiation to petition for arbitration within a specified period after an ILEC receives a request for negotiation, Qwest and Arizona Dialtone were both asked to state their positions on (1) Qwest's authority to petition for arbitration under 47 U.S.C. § 252 and (2) the applicability of the 47 U.S.C. § 252 timelines. As a full discussion of these issues was not possible at the procedural conference, Qwest and Arizona Dialtone were directed to file briefs on those issues by January 28, 2008.

Also at the procedural conference, Qwest and Arizona Dialtone were asked to state their positions on consolidating the Arbitration matter and the Complaint matter. Neither Qwest nor Arizona Dialtone objected to consolidating the two matters. The issue of consolidation was taken under advisement.

In light of the issue regarding Qwest's authority to petition for arbitration under 47 U.S.C. § 252, Qwest and Arizona Dialtone were also asked whether they objected to suspending the timelines under 47 U.S.C. § 252, assuming that they apply. Qwest objected to a suspension of the timelines,

[2] The Complaint matter was assigned Docket No. T-03608A-07-0694 et al.

while Arizona Dialtone did not. As a result of Qwest's objection, the hearing in the Arbitration matter was tentatively scheduled for February 11, 2008. Counsel for Qwest and Arizona Dialtone indicated that this date appeared to be acceptable, and counsel for Qwest was instructed to make a filing as soon as possible if that should prove to be incorrect upon further inquiry. Counsel for Qwest was also instructed that requesting a different hearing date would likely result in suspension of the 47 U.S.C. § 252 timelines.

On January 16, 2008, a Procedural Order was issued directing Qwest and Arizona Dialtone to file the briefs discussed at the procedural conference. Staff was also requested to file such a brief. The Procedural Order also scheduled a hearing in the Arbitration matter to commence on February 11, 2008; requested Staff to appear and participate in the hearing; and directed Qwest and Arizona Dialtone to share equally the costs for transcription, including expedited transcripts, if the hearing were to go forward on the Arbitration matter alone or on both matters, if consolidated. The issue of consolidation was not decided, pending resolution of the issues concerning Qwest's authority to petition for arbitration under 47 U.S.C. § 252 and the applicability of the 47 U.S.C. § 252 timelines.

On January 17, 2008,[3] Arizona Dialtone filed its response to Qwest's Petition. In its response, Arizona Dialtone did not object to or dispute the bulk of Qwest's Petition. However, Arizona Dialtone asserted that, in addition to the issues raised by Qwest, the Arbitration matter should resolve the "true up" of rates sought by Qwest in the Complaint matter and Arizona Dialtone's ongoing billing and pricing disputes with Qwest.

On January 28, 2008, Qwest filed its brief as requested. In its brief, Qwest asserted that it has the authority to petition for arbitration because the FCC has interpreted 47 U.S.C. § 252(a) and (b), in the context of amendments to interconnection agreements, to permit ILECs to initiate requests for negotiation. In support, Qwest quoted a footnote from the FCC's Triennial Review Order ("TRO")[4]. Qwest also asserted that a number of state commissions have independently concluded that ILECs may initiate requests for negotiation under 47 U.S.C. § 252 and, in support, cited a procedural order

[3] This was six days after the deadline for response under 47 U.S.C. § 252(b)(3).

[4] *In re* Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978, 17405 n.2087 (2003)(Report and Order & Order on Remand & Further Notice of Proposed Rulemaking).

of the Alabama Public Service Commission[5] ("Alabama PSC") and an order of the Public Utility Commission of Oregon[6] ("Oregon PUC"). Finally, Qwest stated, because the FCC has "conclusively settled" that, in the context of amendments to interconnection agreements, an ILEC has the authority to petition for arbitration under 47 U.S.C. § 252(b)(1) after making a request for negotiations, the timelines in 47 U.S.C. § 252 apply to the Arbitration matter.

On January 28, 2008, Staff filed its brief as requested. In its brief, Staff asserted that the ability of an ILEC to request arbitration under 47 U.S.C. § 252 is "quite well settled," citing the same footnote from the TRO that Qwest had cited and a couple of court cases[7]. Staff went on to assert that Arizona Dialtone apparently desires to use the ICA Amendment as leverage to get other changes made to its ICA or to obtain rulings on how its existing ICA should be interpreted and that the billing dispute issues raised by Arizona Dialtone would more appropriately be resolved through a complaint filed by Arizona Dialtone. Staff questioned whether an arbitration proceeding is the appropriate vehicle to resolve the parties' issues, as Arizona Dialtone does not appear to object to the substance of the ICA Amendment on a prospective basis. Regarding the issue of the 47 U.S.C. § 252 timelines, Staff stated that it believes the timelines do apply to the proceeding if it goes forward as an arbitration, at least with respect to the issues raised in the Arbitration matter. In addition, Staff stated that it does not support consolidation of the Arbitration matter and the Complaint matter, as arbitration proceedings address issues on a prospective basis, whereas complaint proceedings typically address issues pertaining to disputes regarding existing ICAs. Staff asserted that mixing complaint and arbitration proceedings will ultimately lead to confusion.

On January 29, 2008, Arizona Dialtone filed its brief. In its brief, Arizona Dialtone stated that it had been unable to identify any legal authority regarding whether a request for negotiations by

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[5] *In re* Arbitration of the Interconnection Agreement Between Bellsouth Telecommunications, Inc. and Now Communications, Inc., Pursuant to the Telecommunications Act of 1996, Docket 27461 (Alabama Public Service Commission June 23, 2000)(Procedural Order) ("Alabama Procedural Order").

[6] *In re* Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with Beaver Creek Cooperative Telephone Company, Order No. 02-148 (Public Utility Commission of Oregon March 7, 2002)(Order) ("Oregon Order").

[7] Staff cited *U.S. West Communications v. Sprint Communications Co.*, 275 F.3d 1241 (10th Cir. 2002) and *Illinois Bell Telephone Co. v. Illinois Commerce Commission et al.*, 2007 WL 2815924 (N.D. Ill. 2007). Neither of these cases dealt with a scenario such as the one at hand, where an ILEC actually requested the negotiations that led to the petition for arbitration.

an ILEC is sufficient to trigger the right to petition for arbitration before a state commission under 47 U.S.C. § 252(b). Thus, Arizona Dialtone turned to statutory construction to determine whether Qwest had authority to petition the Commission. Using the plain language of the statute, Arizona Dialtone determined that a request for negotiations made by an ILEC to a CLEC would appear to be insufficient to trigger a right to arbitration. However, by applying the principle of statutory construction that a statute will be construed to avoid "absurd" results,[8] Arizona Dialtone concluded that Qwest should be authorized to petition the Commission for arbitration. Arizona Dialtone stated that it does not oppose arbitration in this matter so long as the Arbitration matter and Complaint matter are consolidated and the consolidated matters are set for hearing on a normal timeline rather than the accelerated timeline required for arbitration. Arizona Dialtone specifically requested that the Commission consolidate the Arbitration matter and the Complaint matter and set the consolidated matters for hearing in or after April 2008. Arizona Dialtone did not speak specifically to whether it believes the arbitration timelines of 47 U.S.C. § 252 apply by law.

DISCUSSION

Qwest's Authority to Petition for Arbitration

47 U.S.C. § 252(b)(1) provides: "During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." By its plain language, this provision authorizes any party to a negotiation to petition the Commission to arbitrate only within a specified window of time after an ILEC has received a request for negotiation. The statute does not address whether a request for negotiation made by an ILEC can also trigger this authority to petition the Commission.

As both Qwest and Staff have pointed out, at least in the context of amendments to interconnection agreements, the FCC has apparently interpreted this statutory provision to allow a party to petition for arbitration even when an ILEC made rather than received a request for negotiation. In the TRO footnote cited by both Qwest and Staff, the FCC stated:

[8] Arizona Dialtone cited *Arpaio v. Steinle*, 201 Ariz. 353, 355 (App. 2001) for this principle.

> Although section 252(a)(1) and section 252(b)(1) refer to requests that are made *to* incumbent LECs, we find that in the interconnection amendment context, either the incumbent or the competitive LEC may make such a request, consistent with the parties' duty to negotiate in good faith pursuant to section 251(c)(1).[9]

In addition, before the TRO was issued, at least two state commissions had ordered that a petition for arbitration is permissible when an ILEC made rather than received a request for negotiation.

In the Alabama Procedural Order cited by Qwest, the Alabama PSC stated the following:

> We conclude from our review of the controlling law that it is indeed permissible for ILECs such as BellSouth to initiate requests for negotiation which trigger the statutory arbitration window of § 252(b)(1). To construe the provisions of § 252(b)(1) to limit such requests for negotiations to CLECs in the present telecommunications environment would undermine the spirit, if not the letter, of § 252(b)(1) to the substantial prejudice of ILECs. Provisions such as the one found in § I., B of the 1997 agreement between BellSouth and NOW which continue agreements that have by their terms expired until such time as the parties have negotiated and/or arbitrated new agreements are common place. To interpret § 252(b)(1) to allow CLECs to exclusively determine when such agreements are in fact renegotiated would unfairly work to the detriment of ILECs. Congress surely did not intend such a result.[10]

Likewise, the Oregon PUC stated the following in the Oregon Order:

> Beaver Creek's interpretation of 252(b)(1) is overly restrictive. To understand the meaning of the subsection in question, it is necessary to consider the purpose of the Act as a whole. Beaver Creek correctly identifies the purpose as fostering competition in local telephone service.
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> Beaver Creek contends that Sections 251 and 252 of the Act are for the benefit of CLECs. However, Section 251(b)(5) of the Act states that all local exchange carriers, CLECs and ILECs alike, have a *duty* to establish reciprocal compensation arrangements for the exchange of telecommunications. Beaver Creek has refused to negotiate the terms of such arrangements with Qwest. Given this situation, Qwest's recourse to Section 252 furthers competition by giving the incumbent a means of requesting the competitive provider to come to terms on the exchange of traffic, as all other CLECs in Oregon that interconnect with Qwest have done. Allowing Qwest to invoke the arbitration procedures in this case levels the playing field for all other CLECs and allows the Commission to exercise the jurisdiction over interconnection arrangements given it in the Act. In this situation, allowing the incumbent to send a request for arbitration furthers the goals of the Act.[11]

It should be noted that, contrary to the assertions of Qwest and Staff, this matter does not

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[9] TRO n.2087.

[10] Alabama Procedural Order, §III, ¶ 11.

[11] Oregon Order, App. A at 4 (footnotes omitted)(emphasis in original).

appear to be completely settled. In 2005, the State of New York Public Service Commission ("New York PSC") reached a conclusion opposite that reached in the Alabama Procedural Order and Oregon Order, expressly determining that 47 U.S.C. § 252 does not authorize an ILEC to make a request for negotiations that triggers a right to petition for arbitration. The New York PSC stated:

> Congress established the § 252 process recognizing that commercial negotiations would be difficult between CLECs and ILECs when CLECs have "nothing that the incumbent needs" and would have "little to offer the incumbent in a negotiation." The language and design of § 252 address the unequal bargaining power that exists in the arbitration proceeding between incumbent carriers like Verizon and competitors like Choice One, to advance Congress's goal of increased competition.
>
> The § 252 procedural rights allow a CLEC to control the timing of a request and to decide to pursue an agreement. Its language is clear. CLECs, not ILECs, may request negotiation, and only after such a request may either party file a petition for arbitration with the Commission within certain time limits. If Verizon's position were credited, Verizon would enjoy significant power. It is this type of unequal bargaining power between CLECs and ILECs that the provisions of § 252 were enacted to remedy.
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> . . .
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> While § 252 does permit an incumbent "carrier or any other party" to petition for arbitration, the window for requesting arbitration begins 135 days after "the [ILEC] receives a request for negotiations." If Congress had intended to permit arbitrations in situations in which the ILEC initiated negotiations, it could have simply set the window "135 days after a request." Instead, Congress explicitly limited arbitrations to CLEC-requested negotiations. Thus, it is clear to us that the procedures for arbitration in § 252 are limited to instances in which the CLEC makes the initial request for interconnection.[12]

The New York PSC did not refer to the TRO footnote referenced by Qwest and Staff, although it did reference the TRO. It is possible that the New York PSC was unaware of the footnote's existence or that it believed it inapplicable, as the ICA between the parties had expired.

The plain language of 47 U.S.C. § 252(b)(1) does not authorize any party to petition a state commission for arbitration after an ILEC has made a request for negotiations. However, in the instant context of an ICA amendment negotiation, it is necessary to determine whether the interpretation of the statute by the FCC should be given deference and followed. When reviewing an agency's interpretation of a statute that it administers, two questions must be asked: (1) whether

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[12] *In re* Petition of Verizon New York Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Interconnection Agreement with Choice One Communications of New York Inc., Case No. 05-C-0515 (State of New York Public Service Commission September 23, 2005)(Order Resolving Arbitration)(footnotes omitted) ("New York Order").

Congress has directly spoken to the precise question at issue, and (2) whether the agency's interpretation is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If Congress's intent is clear, that is the end of the matter, for one must give effect to Congress's unambiguously expressed intent. *Id.* at 842-43. If the precise issue has not been directly addressed by Congress, however, the question becomes whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. To be granted deference, the agency's interpretation need not be the only interpretation that could have been reached or even the interpretation that the inquiring tribunal would have reached if the issue had been before it without the agency's input, just permissible. *Id.* at 843&n.11. If the interpretation represents a reasonable accommodation of conflicting policies that are committed to the agency by statute, it should not be disturbed unless it appears from the statute or its legislative history that the accommodation is one that Congress would not have sanctioned. *Id.* at 845 (citing *U.S. v. Shimer*, 367 U.S. 374, 382, 383 (1961)).

When Congress passed the Telecommunications Act of 1996, the telecommunications industry was fundamentally different than it is now. As explained by the Ninth Circuit Court of Appeals, the telecommunications industry before the Act was a "state-supported monopolistic market structure."[13] As originally conceived in a 1995 bill, the Act's purpose was to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. 104-23, at 1-2 (1995). Regarding interconnection, the bill originally imposed on local exchange carriers "with market power" a duty to negotiate in good faith and to provide interconnection with other telecommunications carriers that requested interconnection. *Id.* at 19. Originally, the FCC would have been tasked with determining which local carriers possessed market power. *See id.* It appears from the one-sidedness of the bill as originally conceived and the Act as adopted that, as asserted by Arizona Dialtone, Congress did not contemplate the current situation, in which ILECs pursue

[13] U.S. West Communications v. Jennings, 304 F.3d 950, 954 (9th Cir. 2002).

negotiations with CLECs. In light of this, it is not surprising that Congress did not acknowledge or make any provisions related to this scenario. Congress was silent as to what requirements would pertain under such a scenario. Thus, under *Chevron*, it is appropriate to look to whether the FCC's interpretation of the statutory provision is one that Congress would have condoned. The overriding purpose of the Act was to increase competition. Determining that ILECs do not have the ability to request negotiation that can lead to the right to petition a state commission for arbitration would foreclose ILECs from participating on equal footing with CLECs by allowing CLECs to hold all of the power. Empowering one party to an existing contractual relationship to seek negotiation that provides a right to arbitration while withholding that power from the other party to the contractual relationship could create the type of anticompetitive imbalance that the Act was designed to remedy, as it places the ILEC into a weaker position and seemingly insulates the CLEC from changes in the market and potentially even the law. The FCC's interpretation of 47 U.S.C. § 252(b)(1)—to allow an ILEC in the context of an ICA amendment negotiation to petition for arbitration even though it was the ILEC who requested negotiation—is permissible, as it is consistent with Congress's intent to enhance competition in the telecommunications industry. Thus, under *Chevron*, it should be granted deference and followed.

Applicability of the Timelines in 47 U.S.C. § 252

From the determination that the FCC's interpretation of 47 U.S.C. § 252(b)(1) in the contest of an ICA amendment negotiation should be followed flows the determination that the timelines in 47 U.S.C. § 252 apply in the Arbitration matter and should be followed.

Consolidation of the Arbitration Matter and Complaint Matter

As stated in the Procedural Order dated January 16, 2008, and acknowledged by Qwest, Arizona Dialtone, and Staff, the factual bases for the Arbitration matter and the Complaint matter are largely the same. Neither Qwest nor Arizona Dialtone initially opposed consolidation of these matters. Qwest did not mention the consolidation issue in its brief. Arizona Dialtone stated in its brief that it supports consolidation of the matters, but requests that the Commission set the consolidated matters for hearing in or after April 2008 rather than according to the expedited schedule of 47 U.S.C. § 252. Staff, which did not participate in the procedural conference and thus

had not voiced an opinion previously on the issue of consolidation, opposed consolidation in its brief.

Because Qwest does not appear to be amenable to delaying the procedural schedule for the Arbitration matter; Arizona Dialtone believes that it would be premature to go forward with the February 11, 2008, hearing if the matters are consolidated; and Staff opposes consolidation altogether, it is appropriate to allow the matters to proceed separately, without consolidation.

IT IS THEREFORE ORDERED that Qwest had the authority to petition the Commission for arbitration under 47 U.S.C. § 252(b)(1) even though it was Qwest, rather than Arizona Dialtone, that made the request for negotiation under 47 U.S.C. § 252(a)(1) and that the Arbitration matter may proceed before the Commission.

IT IS FURTHER ORDERED that the **hearing** in the Arbitration matter shall commence on **February 11, 2008, at 10:00 a.m.**, or as soon thereafter as is practicable, at the Commission's offices, 1200 West Washington, Phoenix, Arizona 85007. **Staff is requested to appear and participate in the hearing.**

IT IS FURTHER ORDERED that Qwest and Arizona Dialtone shall equally share the costs for transcription of the hearing in the Arbitration matter and shall arrange and pay to have expedited transcripts ("dailies") prepared and provided to the Commission's Hearing Division.

IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission *pro hac vice*.

IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113—Unauthorized Communications) applies to this proceeding and shall remain in effect until the Commission's Decision in this matter is final and non-appealable.

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IT IS FURTHER ORDERED that the Arbitrator may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 31st day of January, 2008.

SARAH N. HARPRING
ARBITRATOR

Copies of the foregoing mailed/delivered this 31st day of January, 2008, to:

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